

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

74-2392

United States Court of Appeals
FOR THE SECOND CIRCUIT

PHILLIP A. FERRATO, individually and as President of the New York
State Parkway Police Benevolent Association of Long Island, Inc., and
the NEW YORK STATE PARKWAY POLICE BENEVOLENT
ASSOCIATION OF LONG ISLAND, INC.,

Plaintiffs-Appellants,

—against—

MALCOLM WILSON, as Governor the State of New York, and the
STATE OF NEW YORK PUBLIC EMPLOYMENT RELATIONS
BOARD,

Defendants-Appellees.

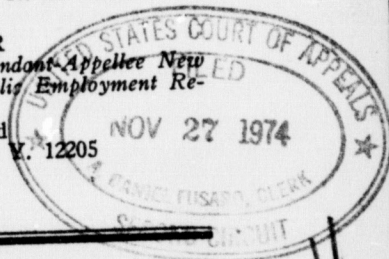
On Appeal from the United States District Court
for the Northern District of New York

APPENDIX

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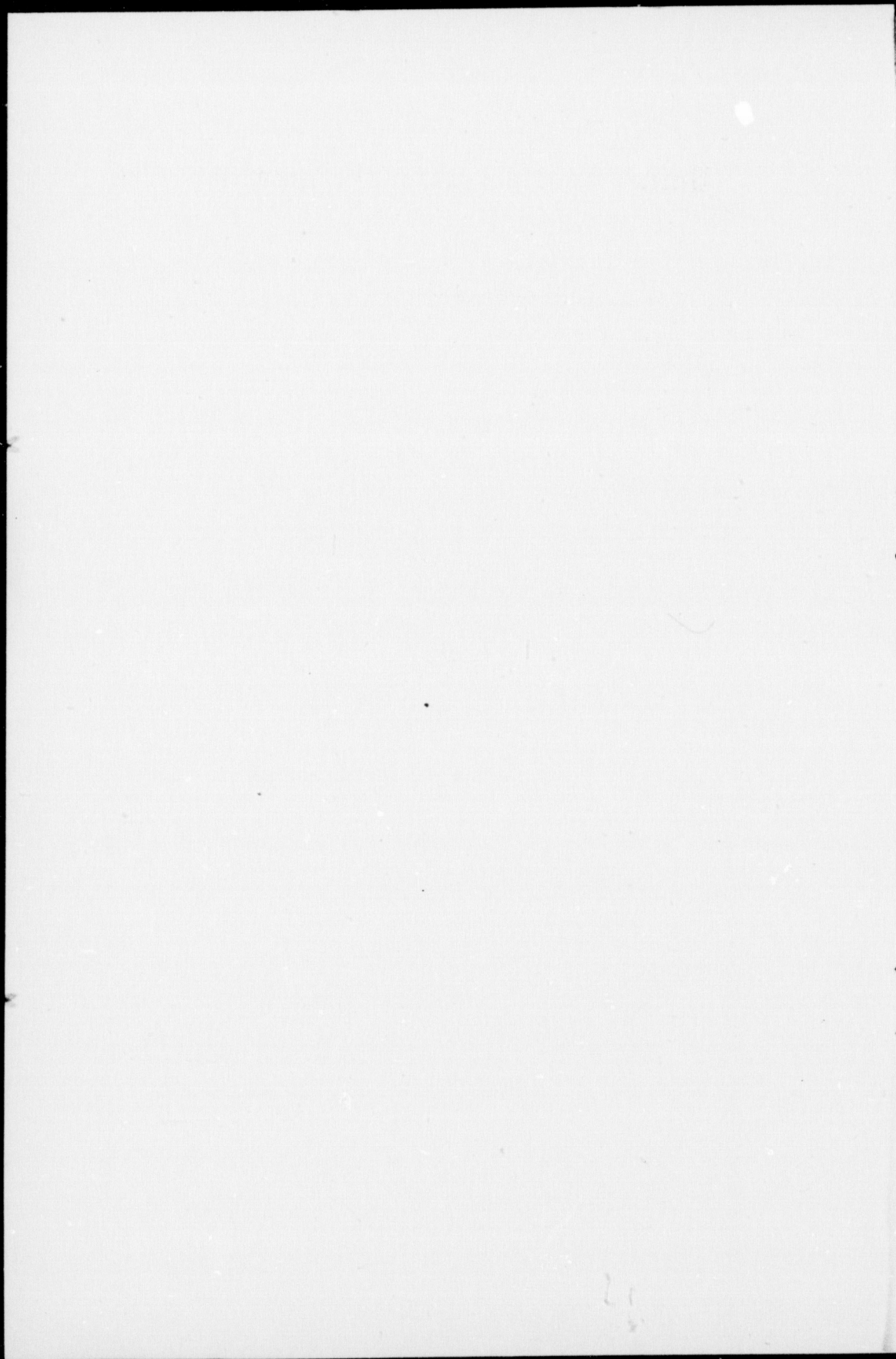
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United States Court of Appeals

FOR THE SECOND CIRCUIT

PHILIP A. FERRATO, individually and as President of the
New York State Parkway Police Benevolent Association
of Long Island, Inc., and the NEW YORK STATE PARKWAY
POLICE BENEVOLENT ASSOCIATION OF LONG ISLAND, INC.,
Plaintiffs-Appellants,

—against—

MALCOLM WILSON, as Governor of the State of New York,
and the STATE OF NEW YORK PUBLIC EMPLOYMENT RE-
LATIONS BOARD,
Defendants-Appellees.

**On Appeal from the United States District Court
for the Northern District of New York**

Docket Entries

1974

Mar. 27 (1) Filed complaint

" 28 Issued summons—original—2 copies & del'vd to
Marshal for service

Apr. 18 (2) Filed summons served 4/16/74 on State of
NY Public Employment Relations Board

Docket Entries

Jerome Lefkowitz, Malcolm Wilson, Gov. of
NY through Ann E. Lewis, Atty on 4/12/74

- May 2 (3) Filed Notice of Motion returnable May 20,
1974 at Albany, to dismiss and affidavit
service
- " 17 (4) Filed affidavit in opposition to defendant's
motion
- " 20 (5) Filed Defendant's memorandum of law in
support of motion to dismiss complaint
- " 20 Motion for an Order Dismissing the Complaint
by defendants. Decision Reserved
- Aug. 1 (6) Filed Memorandum-Decision and Order of
Judge Foley (7/31/74) granting defendant's
motion to dismiss and dismissing the com-
plaint
- " 1 (7) Filed Judgment and mailed cards re: Judg-
ment to Richard Hartman, Louis J. Lefko-
witz and Martin L. Barr
- " 21 (8) Filed Notice of Appeal

Complaint

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

PHILIP A. FERRATO, individually and as President of the
New York State Parkway Police Benevolent Association
of Long Island, Inc., and the NEW YORK STATE PARKWAY
POLICE BENEVOLENT ASSOCIATION OF LONG ISLAND, INC.,
Plaintiffs,

—against—

MALCOLM WILSON, as Governor of the State of New York,
and the STATE OF NEW YORK PUBLIC EMPLOYMENT RE-
LATIONS BOARD,
Defendants-Appellees.

**On Appeal from the United States District Court
for the Northern District of New York**

The plaintiffs, complaining of the defendants, by his attorney, Richard Hartman, Esq., do herein allege:

1. This is an action seeking to redress the deprivation under color of statute, ordinance, regulation, custom, or usage of a right, privilege or immunity secured to the plaintiffs by the Fifth and Fourteenth amendments to the Constitution of the United States and by Title 42, United States Code, Chapter 21, and for other injuries

Complaint

arising under the law and statutes of the State of New York, and the plaintiffs therefore invokes the pendant jurisdiction of this court.

2. The jurisdiction of this court is invoked under 28 United States Code, Section 1343, subdivision 3, this being an action authorized by law to redress the deprivation, under the color of state law, statute, ordinance, custom and usage, of a right, privilege and immunity secured to the plaintiffs by the Fifth and Fourteenth amendments to the Constitution of the United States.

3. That at all times hereinafter mentioned, the plaintiff, Philip A. Ferrato, was and still is a citizen of the United States and a resident of the State of New York and is of full age.

4. That at all times hereinafter mentioned, the plaintiff, Philip A. Ferrato, was and still is employed as a Long Island State Parkway police officer, having been appointed to said position on February 28, 1958.

5. That at all times hereinafter mentioned, the plaintiff, Philip A. Ferrato, holds the office of President of the New York State Parkway Police Benevolent Association of Long Island, Inc., and has been granted the authority to act by and on behalf of said organization with regard to these proceedings.

6. That at all times hereinafter mentioned, the plaintiff, New York State Parkway Police Benevolent Association of Long Island, Inc., is a "not-for-profit" corporation duly organized and existing under the laws of the State of New York, whose membership consists of only Long Island State Parkway police officers and whose mem-

Complaint

bership reflects virtually unanimous participation in its membership by said police officers.

7. That at all times hereinafter mentioned, the defendant, Governor Malcolm Wilson, was and still is the duly elected and/or appointed Governor of the State of New York and is thereby legally charged with the legal administration and execution of the laws of the State of New York.

8. That at all times hereinafter mentioned, the defendant, State of New York Public Employment Relations Board, was established pursuant to Article 14 of the Civil Service Law of the State of New York, more commonly known as the "Taylor Law", and that among its statutory responsibilities, defendant, State of New York Public Employment Relations Board, is charged with determining appropriate unit representation pursuant to Section 207 of Article 14 of the Civil Service Law of the State of New York, a copy of which is annexed hereto as Exhibit "A".

9. That pursuant to an Order of the State of New York Public Employment Relations Board issued shortly after its creation, all State employees were assigned to one (1) of five (5) collective bargaining units with or without their consent.

10. As a result of said Order from the defendant, State of New York Public Employment Relations Board, all Long Island State Parkway Police were assigned, for the purpose of collective bargaining, to the Security Unit, said Unit being designated as their recognized and/or certified negotiating unit.

11. That said Security Unit comprises approximately eight thousand five hundred (8,500) employees, approxi-

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mately two hundred (200) of which are Long Island State Parkway Police Officers.

12. That plaintiff, New York State Parkway Police Benevolent Association of Long Island, Inc., has attempted, through its Presidents, to be recognized by the State of New York Public Employment Relations Board as a separate and distinct entity for contract negotiations dealing with the terms and conditions of employment for all Long Island State Parkway Police Officers.

13. In accordance with said attempt referred to in Paragraph "12" above, the Plaintiffs, New York State Parkway Police Benevolent Association of Long Island, Inc., on or about September 13, 1970, filed through its president at that time, William F. Rupp, a Petition with the defendant, the State of New York Public Employment Relations Board, for decertification alleging that the then currently recognized or certified negotiating representative with regard to negotiating the terms and conditions of employment for Plaintiffs was not their representative as defined in Section 207 of the Civil Service Law of the State of New York, a copy of said Petition is annexed hereto as Exhibit "B".

14. That as a result of the bringing by Plaintiff, New York State Parkway Police Benevolent Association of Long Island, Inc., of said decertification petition, the defendant, the State of New York Public Employment Relations Board, reviewed the issues raised in said petition and concluded that decertification would not be permitted.

15. In view of the fact that plaintiffs comprise approximately two hundred (200) of the eight thousand five

Complaint

hundred (8,500) member Security Bargaining Unit, they are effectively deprived of a meaningful voice in determining policy of said Security Unit with regard to Collective Bargaining decisions.

16. That as of the time of the creation of the Security Unit, the Long Island State Parkway Police were the highest paid employees placed within said Security Unit.

17. That as of the date of the creation of said Security Unit and continuing to date, the Long Island State Parkway Police salary level was utilized by said Security Unit in negotiations with the State of New York as the guage by which other State employees within said Security Unit had their salary levels increased to that of the Long Island State Parkway Police level without having a comparable proportionate increase negotiated for and on behalf of said Long Island State Parkway Police.

18. That as a result of having no effective voice within said Security Unit due to the fact that said Long Island State Parkway Police comprised only approximately two hundred (200) men out of a bargaining unit consisting of approximately eight thousand five hundred (8,500) men, that plaintiffs have, in effect, been deprived of their basic constitutional guarantees to negotiate, for and on behalf of themselves, a meaningful contract related to the terms and conditions of their employment.

19. That due to the placement of plaintiffs within the Security Unit, the defendants, in effect, deprived plaintiffs of a property right without due process of law in violation of the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution as well as in violation of Title 42, United States

Complaint

Code, Section 1983, more commonly known as the Federal Civil Rights Statute.

20. That as further evidence of the injustices herein set forth, it should be further noted that approximately seven thousand (7,000) Correction Officers are contained within said Security Unit, the nature and duties of said Correction Officers being totally different from those of the Long Island State Parkway Police. In addition, the State Police, which evidence great similarity in job function, organization and training to those of plaintiff, comprise their own bargaining unit with the State of New York.

21. That as a result of defendants' actions, plaintiffs continue to be deprived of their constitutional guarantees as referred to above and suffer, have suffered and will continue to suffer irreparable harm as long as defendants' conduct is permitted to continue.

22. That in placing plaintiffs in the Security Unit for the purposes of collective bargaining, defendants acted arbitrarily, capriciously and without legal basis. In light of the prior conduct of said representation, said Security Unit has failed to properly represent the interests of Long Island State Parkway Police in negotiations concerning the terms and conditions of their employment with the state. Additionally, the conduct of said representation by the Security Unit for and on behalf of the plaintiffs is such as to go contrary to the purpose and intent of the Taylor Law which initiated the concept of collective bargaining between governmental employers and their employees.

23. By reason of the foregoing, plaintiffs have been deprived of their constitutional guarantees as set forth in

Complaint

the Fifth and Fourteenth Amendments of the United States Constitution and continue to be so deprived as a result of defendants' actions.

WHEREFORE, plaintiffs demand judgment against the defendants seeking an order directing the defendants to recognize the New York State Parkway Police Benevolent Association of Long Island, Inc., as the exclusive recognized bargaining unit of the Long Island State Parkway Police pursuant to Section 207 of Article 14 of the Civil Service Law of the State of New York.

Dated: March 18, 1974
Mineola, New York

RICHARD HARTMAN
Attorney for Plaintiffs
Office and P. O. Address
300 Old Country Road
Mineola, New York
(516) PI 2-9000

Exhibit A, Annexed to Complaint**§ 207. DETERMINATION OF REPRESENTATION STATUS**

For purposes of resolving disputes concerning representation status, pursuant to section two hundred five or two hundred six of this article, the board or government, as the case may be, shall

1. define the appropriate employer-employee negotiating unit taking into account the following standards:

(a) the definition of the unit shall correspond to a community of interest among the employees to be included in the unit;

(b) the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment upon which the employees desire to negotiate; and

(c) the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public.

2. ascertain the public employees' choice of employee organization as their representative (in cases where the parties to a dispute have not agreed on the means to ascertain the choice, if any, of the employees in the unit) on the basis of dues deduction authorization and other evidences, or, if necessary, by conducting an election.


Exhibit A, Annexed to Complaint

3. certify or recognize an employee organization upon
(a) the determination that such organization represents
that group of public employees it claims to represent, and
(b) the affirmation of such organization that it does not
assert the right to strike against any government, to as-
sist or participate in any such strike, or to impose an ob-
ligation to conduct, assist or participate in such a strike.
Added L. 1967, c. 392, § 2, eff. Sept. 1, 1967.

12a

Exhibit B, Annexed to Complaint

[PHOTOSTAT]

(Opposite) 

ONLY COPY AVAILABLE

State of New York
Public Employment Relations Board

P E T I T I O N

FOR CERTIFICATION AND/OR DECERTIFICATION

INSTRUCTION. Submit an original and three (3) copies of this Petition to the Director of Public Employment Practices and Representation, New York State Public Employment Relations Board, 50 Wolf Road, Albany N.Y. 12205. If more space is required for any item, attach additional sheets, numbering them accordingly.

DO NOT WRITE IN THIS SPACE

Case No.:

Date Filed:

The Petitioner alleges that the following circumstances exist and requests that the New York State Public Employment Relations Board proceed under its proper authority.

1. Purpose of this Petition. (Check only the boxes that are appropriate).

- A. ☒ Certification of negotiating representative -- A substantial number of employees wish to be represented for purposes of collective negotiations by Petitioner and Petitioner desires to be certified as representative of the employees for purposes of collective negotiations pursuant to Section 207 of the Law.
- B. ☐ Representation (Employer) -- One or more employee organizations have presented a claim to Petitioner to be recognized as the negotiating representative of employees of Petitioner.
- C. ☒ Decertification -- A substantial number of employees assert that the currently recognized or certified negotiating representative is not their representative as defined in Section 207 of the Law.

2. Name of Petitioner: William F. Rupp

Affiliation, if any: Long Island State Parkway Police Benevolent Association

3. Address of Petitioner (No. & Street, City & ZIP Code):

Telephone Number:

212 Bridgefield Road, Hempstead, New York 11757

(516) 224-0364

4. Name of Employer:

Long Island State Park Commission

5. Address of Employer (No. & Street, City & ZIP Code):

Belmont Lake State Park, Babylon, New York

Telephone Number:

(516) 100-1000

6. Description of negotiating unit claimed to be appropriate
(Be complete and specific, using job titles):

Included: Captains (Traffic & Park Officer) Grade 22
Patrolmen (Traffic & Park Officer)
Grade 14
Sergeants (Traffic & Park Officer)
Grade 16
Lieutenants (Traffic & Park Officer)
Grade 18

Excluded: Chief of Police (Traffic & Park Officer)
Grade 25

6a. Number of employees in unit: 203

6b. Is this Petition supported by:

(1) 10% or more of the employees in the unit

☒ Yes ☐ No

(2) 30% or more of the employees in the unit

☒ Yes ☐ No

7. Does the Petitioner seek exclusive rights of representation?

☒ Yes ☐ No

8. Request for recognition as negotiating representative was made

UNKNOWN

(Month, Day, Year)

☐ Has not replied. (Explain on rider, if necessary).

☐ Declined recognition on _____
(Month, Day, Year)

9. Recognized or certified negotiating agent: (If there is none, so state).

Name: Security Unit Employees Council

Affiliation:

Address: 52
55 Colbin Avenue
Albany, New York

Date of recognition or certification:

PER 1 (9-69)

Exhibit "B"

Employee organizations other than Petitioner (and other than those named in Item 2 above) which claim recognition as negotiating representative, and other employee organizations known to have an interest in representing any employees in the unit described in Item 6 above. (If none, so state).

Date of Claim
(Required only if
Petition is filed
by employer)

Name	Address	Affiliation	Date of Claim (Required only if Petition is filed by employer)
Civil Service Employees Association	111 West 11th Street	Union	New York

If the above-named employer is a party to a contract dealing with terms and conditions of employment: (If there is none so state).

- (a) Name of the other party to the contract: Brooklyn Institute of Music Council
(b) Date of expiration of the contract: 1970
(c) The negotiating unit specified in the contract: Civil Service Unit

(d) Is a copy of the contract attached? ☐ Yes ☒ No

Is this matter subject to Section 206.1 or 212 of the Law? ☒ Yes ☐ No

If you have checked Box 1. A. above:

- (a) If an employee organization, have you filed financial reports with the New York State Department of Labor as required by Labor Law § 726? ☒ Yes ☐ No; or with the Board of Regents as required by Education Law § 137? ☐ Yes ☐ No

If a membership corporation, was your certificate of incorporation approved by the New York State Board of Standards and Appeals pursuant to Membership Corporation Law § 11(1)(a)? ☒ Yes ☐ No

- (b) Do you affirm that you and the employee organization you represent or support, do not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist, or participate in such a strike? ☒ Yes ☐ No

4. If you have checked Box 1. C. above:

- (a) State the grounds upon which the certification should be revoked or the recognition annulled. The grounds for annulment are: Employees who do not have a community of interest with public employees and the possibility of per representation.
(b) Has the employee organization currently recognized or certified by the public employer engaged in a strike or caused, instigated, encouraged or condoned a strike against any government? ☐ Yes ☒ No

14. If you have checked Box 1. C. above:

- (a) State the grounds upon which the certification should be revoked or the recognition annulled. The certified bargaining agent is composed of employees who do not have a community of interest with police officers. It states the possibility of proper representation for all the
- (b) Has the employee organization currently recognized or certified by the public employer engaged in a strike or caused, instigated, encouraged or condoned a strike against any government? ☐ Yes ☒ No
- (c) Is the employee organization currently recognized or certified designated as an exclusive negotiating representative? ☒ Yes ☐ No

15. Include a clear and concise statement of any other relevant facts.

The Long Island State Parkway Police Benevolent Association has 100% of the membership of the police officers while Local 170, which is the certified representative, has amongst other employees only about 10% of the membership of the police department. This leaves a vast number of police officers unrepresented by anyone. The community of interest lies in the P.B.A., not in the union.

I declare that I have read the above Petition and that the statements herein are true to the best of my knowledge and belief.

William F. Kupp - Long Island State Parkway Police Benevolent Association
(Petitioner and Affiliation, if any)

By William F. Kupp
(Signature of representative of person
filing Petition)

(Title, if any)

Dated: September 12, 197

Notice of Motion

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 74-CV-124

SAME TITLE

PLEASE TAKE NOTICE that the Defendants, Malcolm Wilson, as Governor of the State of New York, and the New York State Public Employment Relations Board will move this Court at the session of the United States District Court, to be held at the Federal Building, Albany, New York, on May 20, 1974 at 10:00 in the forenoon or as soon thereafter as counsel can be heard for an order dismissing the complaint on the grounds that:

1. The Court lacks jurisdiction over the subject matter;
2. The complaint fails to state a claim upon which relief can be granted, to wit:
 - a. the action may not be maintained because of res judicata;
 - b. the action is barred by the statutes of limitations in New York Civil Service Law §213(a) and the New York Civil Practice Law and Rules §217,
 - c. the plaintiffs have failed to exhaust their administrative remedies;
3. The plaintiffs have failed to join a party under Rule 19; and

Notice of Motion

4. For such other and further relief as to the Court may seem just and proper.

/s/ MARTIN L. BARR
Martin L. Barr
Attorney for Defendant State of
New York Public Employment Re-
lations Board
Office and P.O. Address
50 Wolf Road
Albany, New York 12205

LOUIS J. LEFKOWITZ
Attorney General of the State of
New York, Attorney for Defend-
ant Malcolm Wilson, as Governor
of the State of New York
Office and P.O. Address
The Capitol
Albany, New York 12224

By: /s/ JOHN Q. DRISCOLL
John Q. Driscoll
Assistant Attorney General

Dated: Albany, New York
May 2, 1974

To: RICHARD HARTMAN, Esq.
300 Old Country Road
Mineola, New York 11501

**Affidavit of Philip A. Ferrato in Opposition
to Defendant's Motion**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 74-CV-124

SAME TITLE

PHILIP A. FERRATO, being duly sworn, deposes and says:

1. That I am a Plaintiff in the above entitled action and am fully familiar with all of the facts, circumstances and pleadings associated with the above captioned matter and make this Affidavit in opposition to Defendant's motion seeking an Order dismissing Plaintiff's Complaint.

2. With regard to Defendant's allegation that this Court lacks jurisdiction over the subject matter and issues raised by Plaintiffs in their pleadings, Plaintiff, Philip A. Ferrato, respectfully submits to this Court that under Section 1343 of Title 28 of the United States Code as well as Section 1983 of Title 42 of the United States Code, this Court is specifically granted jurisdiction to entertain a case alleging a violation of Plaintiffs civil rights. The fact that a State remedy may also exist, does not exclude thereby the right of Plaintiffs to seek resolution in the Federal Courts of the issues raised by them. See *Ammung v. City of Chester*, D. C. Pa. 1973, 355 F. Supp. 1300; *Krahm v. Graham*, C. A. Arizona 1972, 461 F. 2d 703; *Lucero v. Donovan*, D. C. Calif. 1966, 258 F. Supp. 979; and

*Affidavit of Philip A. Ferrato in Opposition
to Defendant's Motion*

Quarles v. State of Texas, D. C. Texas 1970, 312 F. Supp. 835.

3. As to Defendant's allegation that Plaintiff's Complaint fails to state a claim upon which relief can be granted, Plaintiff, Philip A. Ferrato, respectfully submits to this Court that Section 1343 of Title 28 of the United States Code as well as Section 1983 of Title 42 of the United States Code provide the mechanism whereby Plaintiff's claim herein can be re-dressed.

4. As to Defendant's claim that Plaintiffs are barred from seeking the relief set forth in the original Complaint due to "Res Judicata," Plaintiff, Philip A. Ferrato, respectfully submits to this Court that the criteria of sustaining a "Res Judicata" claim are not met herein and that the issue raised in the original Complaint has for the first time been presented to this Court by this Plaintiff against the above named Defendants.

5. As to Defendant's claim that Plaintiffs are barred from bringing this action as a result of the Statutory Limitations set forth in Section 213 (a) of the New York Civil Service Law and as well as Section 217 of the New York Civil Practice Law and Rules, Plaintiff, Philip A. Ferrato, respectfully submits to this Court that in the area of Civil Rights Litigation, and in particular with regard to litigation arising under Section 1343 of Title 28 of the United States Code and Section 1983 of Title 42 of the United States Code, State procedural time limitations are not binding upon Federal litigation since the State statutes containing said procedural time limitations in no way form a basis for the bringing of the Federal claims.

*Affidavit of Philip A. Ferrato in Opposition
to Defendant's Motion*

6. As stated above, there exists both Federal and State remedies for seeking a re-dress of grievances based upon violation of one's civil rights. To attempt to exclude one from pursuing a Federal Court remedy based upon State procedural time limits flies in the face of this basic doctrine that one can seek either a re-dress of grievances through the State Court or through the Federal Court. As recognized in *Grayson v. Montgomery*, C. A. Mass. 1970, 421 F. 2d 1306, one does not need to exhaust one's state remedies prior to seeking re-dress of one's grievance in the Federal Courts.

7. In accordance with the above, Plaintiff, Philip A. Ferrato, additionally wishes to point out to the Court that in the area of civil rights litigation, the Federal Courts have instituted a policy wherein the Abstention Doctrine is characteristic of certain Federal litigation is not applicable in the area of civil rights. In fact, the policy has been to be extremely lenient in hearing civil rights litigation. See *Devlin v. Sosbe*, C. A. Ind. 1972, 465 F. 2d 169.

8. As to Defendant's claim that under Rule 19, Plaintiffs have failed to join an essential party, Plaintiffs respectfully submit to the Court that, if in the Court's determination that such be the case, that the Court will grant to Plaintiffs the opportunity to amend the above captioned matter and serve the appropriate party so that this Court would be able to properly determine the issues raised herein as they affect all essential parties to the litigation.

WHEREFORE, Plaintiffs demand judgment against the Defendants dismissing their motion seeking to have Plaintiffs Complaint dismissed as well as seeking an Order

*Affidavit of Philip A. Ferrato in Opposition
to Defendant's Motion*

from this Court directing Defendants to submit an answer within the appropriate time limitations and for such other and further relief as to this Court may seem just and proper.

Dated: Mineola, New York
May 17, 1974

/s/ PHILIP A. FERRATO

(Verified by Philip A. Ferrato, May 17, 1974.)

Memorandum-Decision and Order

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

74-CV-124

[SAME TITLE]

Appearances:

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300 Old Country Road
Mineola, L.I., N.Y. 11501

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Attorney General of State of New York
Attorney for Defendant
Governor Malcolm Wilson
The Capitol
Albany, New York 12224

Of Counsel:

JOHN Q. DRISCOLL
Asst. Attorney General

MARTIN L. BARR
Attorney for Defendant New York State
Public Employment Relations Board
50 Wolf Road
Albany, New York 12205

Of Counsel:

KENNETH J. TOOMEY

JAMES T. FOLEY, D. J.

Memorandum-Decision and Order

MEMORANDUM-DECISION and ORDER

Plaintiff, individually and as President of the New York State Parkway Police Benevolent Association of Long Island, Inc. (hereinafter "Association"), together as named plaintiffs bring this action pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 against Governor Malcolm Wilson and the New York State Public Employment Relations Board (PERB) alleging violation of their civil rights under the Fifth and Fourteenth Amendments to the United States Constitution.

This controversy centers around Article 14 of the New York State Civil Service Law (Taylor Law), Sections 205.5 and 207 which empower PERB to establish bargaining units for the employees of the State of New York. PERB, in accordance with the statutory directive, has established five units for bargaining purposes, one of which is known as the "Security Unit" consisting of *inter alia*, "... occupations involving the protection of persons and property; enforcement of laws, codes, rules and regulations concerned with security and highway safety . . ." Matter of State of New York, 1 PERB 3226, 3232 (November 27, 1968). The Association with its approximately 200 members was included by decision of PERB on February 27, 1969, in the Security Unit whose total membership is approximately 8500 employees.

Subsequently, pursuant to the statute, elections were held to determine representation of the Security Unit. The AFL-CIO Council 82 (AFSCME) was duly chosen and certified and it is now known as the Security Unit Employees, Council 82.

Apparently dissatisfied with this result, on September 13, 1970 the Association attempted to petition PERB to decertify the Security Unit Employees, Council 82. This

Memorandum-Decision and Order

petition was denied as being untimely and returned to the Association on September 16, 1970. Thereafter, an Article 78 proceeding was instituted in the New York courts challenging this determination, which was dismissed as untimely and as presenting no significant legal question, i.e., it was ruled that the legal question has already been decided in *Matter of Civil Service Employees Association, Inc. v. Helsby*, 32 A.D. 131 (3rd Dept. 1969), *aff'd* 25 N.Y. 2d 842 (1969). *Matter of Rupp v. Klein*, N.Y. Supreme Ct., Albany County, June 15, 1970, unreported.

Still unsatisfied with this outcome, the Association launched another suit in the courts of New York challenging the constitutionality of the statutes at issue in the case at bar. The Association also lost this suit and the statutes were declared to be constitutional. *Matter of Rupp v. Rockefeller*, 4 PERB 7005, N.Y. Supreme Ct., Albany County, January 22, 1971, unreported. Copies of both these decisions for convenience are filed with this decision.

The Association in this action attempts to litigate the same incident again in this United States District Court under the guise of a civil rights suit. Defendants have made a motion to dismiss which is hereby granted for the following reasons:

First, this suit was commenced with the filing of the complaint on March 27, 1974. This is not within the three year statute of limitations applicable to actions under 42 U.S.C. § 1983. N.Y. CPLR § 214(a); see *Rosenberg v. Martin*, 478 F. 2d 520, 526 (2d Cir. 1973); *Romer v. Leary*, 425 F. 2d 186, 187 (2d Cir. 1963); *Swan v. Board of Higher Ed.*, 319 F. 2d 56, 60 (2d Cir. 1963); generally, *Reed v. Hutto*, 486 F. 2d 534, 537 n. 2 (8th Cir. 1973).

Second, because of the previous litigation by the same parties *sub nom.* in the state courts of the constitution-

Memorandum-Decision and Order

ality of this statute, any similar claim is now barred in my judgment by *res judicata*, and thus cannot be raised by a § 1983 action. *Thistlethwaite v. City of New York*, — F. 2d —, Slip. Op. 3441 (2d Cir. May 13, 1974); compare, *Lombard v. Bd. of Education of the City of New York*, — F. 2d —, Slip. Op. 4907 (2d Cir. July 22, 1974); see *Mastracchio v. Rici*, — F. 2d —, 43 U.S.L.W. 2028 (1st Cir. June 24, 1974); *Lovely v. Laliberte*, — F. 2d —, 43 U.S.L.W. 2030 (1st Cir. June 24, 1974); also *Dillard v. Industrial Commission of Virginia*, — U.S. —, —, 42 U.S.L.W. 4729, 4732 (May 15, 1974).

And finally, the complaint states no claim upon which relief can be granted. To wit, there is no federally recognized right for minority public employees to be allowed their own individual bargaining unit, i.e., there is no denial of property or due process. *W.H.H. Chamberlin, Inc. v. Andrews*, 271 N.Y. 1, aff'd, 299 U.S. 515 (1936), rehearing denied, 301 U.S. 714 (1937); *Mtr. of Bauch v. City of New York*, 21 N.Y. 599 (1968); *Mtr. of Kraemer v. Helsby*, 35 App. Div. 2d 297 (3rd Dept. 1970), appeal dismissed *sub nom.* *Mtr. of Kraemer v. PERB*, 28 N.Y. 2d 717 (1971), cert. den. 404 U.S. 824 (1971); cf. *Douds v. International Longshoremen's Ass'n*, 241 F. 2d 278 (2d Cir. 1957); see also, *Rogoff v. Anderson*, 34 App. Div. 2d 154 (1st Dept. 1970), aff'd 28 N.Y. 2d 880 (1971), appeal dismissed 404 U.S. 805 (1971); *Board of Education of Grand Island v. Helsby*, 37 App. Div. 2d 493 (4th Dept. 1971); *No. Belmore Teachers Ass'n v. Board of Education*, 68 Misc. 2d 238 (N.Y. Sup. Ct. 1971).

Any of these three grounds separately or collectively is clearly sufficient to dismiss this complaint. In my judgment, the filing of this action is a belated attempt to ob-

Memorandum-Decision and Order

tain another day in a busy federal court on issues that have been fairly and judicially determined and must be considered as frivolous under the Civil Rights statutes invoked.

The defendants' motion is granted and the complaint is hereby dismissed.

It is so Ordered.

Dated: July 31, 1974
Albany, New York

JAMES T. FOLEY
United States District Judge

Notice of Appeal

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil Action No. 74-CV-124

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that the Plaintiffs, Phillip A. Ferrato, individually and as President of the New York State Parkway Police Benevolent Association of Long Island, Inc., and the New York State Parkway Police Benevolent Association of Long Island, Inc., herein appeal to the United States Court of Appeals for the Second Circuit, from the judgment and order made by the Honorable James T. Foley on the 31st day of July, 1974 and entered herein on the 1st day of August, 1974.

Dated: Mineola, New York
August 12, 1974

Yours etc.,

RICHARD HARTMAN
Attorney for Plaintiffs
300 Old Country Road
Mineola, New York 11501
(516) 742-9000

Notice of Appeal

To: LOUIS J. LEFKOWITZ
Attorney General of State of New York
Attorney for Defendant
Governor Malcolm Wilson
The Capitol
Albany, New York 12224

MARTIN L. BARR
Attorney for Defendant New York State
Public Employment Relations Board
50 Wolf Road
Albany, New York 12205

THE UNITED STATES COURT OF APPEALS::: FOR THE SECOND CIRCUIT

376—Affidavit of Service by Mail

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

PHILLIP A. FERRATO, et al.,

Plaintiffs-Appellants

v.

MALCOLM WILSON..., THE NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS

Defendants-Appellees.

State of New York, County of New York, ss.:

Harold Dudash, being duly sworn deposes and says that he is
agent for Richard Hartman the attorney
for the above named Plaintiffs-Appellants herein. That he is over
21 years of age, is not a party to the action and resides at 2530 Young Avenue, Bronx, N.Y.

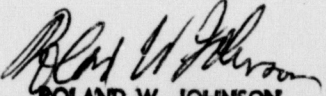
That on the 27th day of November, 1974, he served the within Appendix to Brief of
Plaintiffs-Appellants and Brief of
Plaintiffs-Appellants.

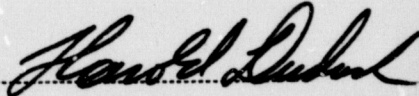
upon the attorneys for the parties and at the addresses as specified below
Louis J. Lefkowitz, Attorney General of the State of New York., Attorney for Defendant-
Appellee, Governor Malcolm Wilson,
The Capitol, Albany, N.Y. 12224

Martin L. Barr, Attorney for defendant-appellee New York State Public Employment Relations
Board, 50 Wolf Road, Albany, N.Y. 12205

by depositing **three copies of the brief and three of the appendix**
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this 27th
day of November, 1974


ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509105
Qualified in Delaware County
Commission Expires March 30, 1976





2085-17